86-1183

No.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. . . . . PETITIONER

versus

CITY OF LOUISVILLE, KY., et. al. . . RESPONDENTS

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I

Is it just and proper to apply the holding of Wilson v. Garcia, ___U.S. ___, 105 S.Ct. 1931 (1985) retroactively so as to extinguish a claim filed pursuant to 42 U.S.C. section 1983 before the Wilson opinion was handed down where the claim was timely filed according to the state of the law as it existed at the date the claim was filed?

II

May a United States District Court, under the authority of Migra v. Warren City School District, ___ U.S. ___, 104 S.Ct. 892, 97 L.Ed.2d 56 (1984) ever accord complete preclusive (res judicata) effect to a state court judgment without any reference whatsoever to the law of judgments of the state whose court issued the judgment?

III

Does the Kentucky law of judgments accord res judicata effect in later proceedings to issues that were not raised in earlier proceedings that resulted in a judgment pleaded as a bar to the later proceedings?

IV

May a United States District Court upon a motion for summary judgment by defendants refuse to believe a plaintiff's testimony and upon the basis of that disbelief denominate the plaintiff's conduct as "hard core," thereby depriving him of standing to challenge as unconstitutionally vague a regulation that was used to justify his dismissal from a municipal police department?

PARTIES TO THIS PROCEEDING

The Petitioner is Joseph Leon Fowler, Jr.

The Respondents are the City of Louisville, Kentucky, the Louisville Civil Service Board, David Thomas, William Stansbury, Philip Scholtz, Jon Higgins, Anthony Trusty, James Thornberry, Ann DeLozier, James Powers, George Kinkead, James Carr, and George Clement.

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REPORTS OF OPINIONS BELOW

So far as the Petitioner knows, none of the opinions of the Courts below have been officially or unofficially reported. The opinion of the United States District Court for the Western District of Kentucky in this case is appended hereto as Exhibit B. The Order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's opinion may be found appended hereto as Exhibit C.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the order sought to be reviewed is September 30, 1986 (Appendix, Exhibit C). It does not show a different date of entry.

No petition for rehearing was filed with respect to the Order sought to be reviewed.

Petitioner believes that this Court has jurisdiction to review the Order in question by writ of certiorari under and by virtue of 28 United States Code section 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE*

United States Constitution, Amendment 5

United States Constitution, Amendment 14

42 United States Code, section 1983

Kentucky Revised Statutes 90.190

Kentucky Revised Statutes 413.120(2)

Kentucky Revised Statutes 413.140

Rule 126, section 12, of the Louisville Police Department

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*Full citations are in the Appendix as Exhibit D

STATEMENT OF THE CASE

The Petitioner, Joseph Leon Fowler, Jr., filed this lawsuit in the United States District Court for Western Kentucky, in which jurisdiction existed under and by virtue of Title 28 of the United States Code, Sections 1331, 1332, and 1343, in order to attempt to vindicate his rights to due process of law under the fifth and fourteenth amendments to the United States Constitution. Fowler alleged that the Respondents had violated his rights by either bringing about his discharge pursuant to an unconstitutionally vague regulation of the Louisville Police Department or by undertaking to deny him a fair hearing upon his "appeal" of his discharge to the Louisville Civil Service Board.

The Respondents include the following persons and entities. The titles of the individuals listed are as of the date that the Louisville Civil Service Board denied Fowler's appeal, November 29, 1978:

The City of Louisville;

The Louisville Civil Service Board;

David Thomas, Executive Secretary to the

Board;

William Stansbury, Mayor of Louisville;

Philip Scholtz, Louisville Safety Director;

Jon Higgins, Louisville Police Chief;

Anthony Trusty, Assistant Louisville Police Chief;

James Thornberry, Chairman of the Louisville Civil Service Board;

Ann DeLozier, member of the Louisville Civil Service Board;

James Powers, member of the Louisville Civil Service Board;

George Kinkead, member of the Louisville Civil Service Board;

James Carr, member of the Louisville Civil Service Board; and

George Clement, member of the Louisville Civil Service Board.

***** ***** *****

At some time during May or June, 1978, Fowler paid Officer Harold Graham of the Louisville Police Department the sum of $3,000 for materials that Graham represented would appear on an upcom-

ing examination for the rank of captain on the Louisville Police Department. Fowler was scheduled to take the examination, and in fact did so, during the month of July, 1978. He testified that he consummated his transaction with Graham only after months of pressure from Graham and his knowledge of the following facts:

1. That Graham was well known throughout the Louisville Police Department as a "bag man" for Chief Higgins, and represented to Fowler that his sale of the materials in question had Higgins' approval.

2. That Graham would sell the materials to another candidate for the captaincy if Fowler refused to buy them from him.

3. That Higgins was thoroughly corrupt and dishonest. Fowler had seen Higgins take money and presents from a known bookmaker and he had also seen Higgins personnally impede the enforcement of Kentucky's anti-vice laws when Higgins was a Captain with the Louisville Police Department (Fowler Deposition, Pp. 37, 40-53; Higgins Depo., P. 15).

4. The entire process by which purportedly competitive examinations were given by the Louisville Civil Service Board was riddled with cheating and corruption (Fowler Depo., Pp. 38, 52-59).

5. The administration of Mayor William Stansbury made no effort to police or prevent any of these problems or Higgins' corrupt management of the police department except to the limited extent that was necessary to attempt to prevent negative media coverage.

6. There were only two promotions available to the rank of captain based upon the results of the captain's examination that would be given during July, 1978, and it was pre-ordained that one of Higgins' most favored cronies on the Louisville Police Department, Lieutenant Larry Ogle, would receive one of these (Id., Pp. 19-20, 29-30; see also Higgins Depo., Pp. 31-32, 38, for Higgins' description of his incredible relationship with Larry Ogle).

Fowler later discovered that Ogle had commissioned two Louisville Police officers to burgle the offices of the Louisville Civil Service Board

and steal the actual test that was used for the July, 1978, captain's examination, and that Ogle used these stolen materials to aid him in placing first on the examination. Almost immediately after the examination, Higgins promoted Ogle to the rank of captain and neither Ogle nor Harold Graham were ever punished for their actions in these matters (Fowler Depo., Pp. 15, 24-28).

Fowler believed that he would have no chance of being promoted to captain if he did not purchase Graham's materials and get them out of circulation (Id., Pp. 30, 33-35).* Fowler testified that:

> I bought the examination in order to make sure that there was no cheating on the examination between myself and the other people on the captain's examination, myself, Lindeman, Dotsun, Morton [Childress] whoever else, what I did, I tried to prevent cheating on the Captain's exam outside of Ogle, who I had no control of (Id., at Pp. 37, 14-15).

According to Fowler, after he bought the materials from Graham, he flipped through them briefly, took them home, and threw them away (Id., at 33). Fow-

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[1]This petition is probably not the proper place in which to discuss all of the evidence in detail that bears upon Petitioner's state of mind when he bought the materials from Graham and the events upon which it was based. These matters are narrated at Pp. 1-14 of Appellant's Brief for the Sixth Circuit.

ler then took a 30 day leave to prepare for the captain's examination, on which he finished in second place behind Larry Ogle (Id., P. 91).

There the matter would undoubtedly have rested but for two facts. One was that a Major Thomas Hogan of the Louisville Police Department's Criminal Investigation Section had begun an investigation into the possibility that Larry Ogle had secured a stolen copy of the actual questions and answers that were used on the July, 1978, captain's examination (Higgins Depo., Pp. 66-67; Fowler Depo., Pp. 54-55). Chief Higgins quickly ended Hogan's investigation as soon as he discovered it (Hogan had tried to keep it a secret from Higgins, for obvious reasons) by transferring Hogan, an old factional enemy who had escaped Higgins' purge of command officers at the beginning of his term as chief because of Stansbury's protection, to the Technical Services Bureau (Higgins Depo., P. 68).

The other reason that Fowler's transaction with Graham ultimately came to light was that rumors of irregularities in the administration of the captain's examination led to the Louisville

Board of Aldermen's calling Higgins on the carpet to attempt to explain the situation. Naturally, Higgins promised that he would fire anybody who had tampered with the July, 1978, captain's examination, should any such person come to light (Id., Pp. 54-55).

In light of these developments, Fowler himself decided that he should come forward in some manner with information about his transaction with Graham. When the Internal Affairs Unit of the Louisville Police Department notified him on approximately August 21, 1978, that it wanted to interview him about the captain's examination, he was ready to tell everything that he knew about the matter to these investigators. However, Internal Affairs postponed its interview with Fowler upon several occassions, probably in order to give Higgins time to save the job of his crony, Harold Graham. Higgins was able to manuever Graham into giving a statement about his deal with Fowler slightly before Internal Affairs finally got around to taking Fowler's statement on September 7, 1978. This allowed Higgins an excuse to grant Graham "immunity" from any sort of

discipline or prosecution and to fire Fowler immediately upon learning of Fowler's statement to Internal Affairs, which he did (Fowler Depo., P. 46; Higgins Depo., Pp. 50-52, 54-55).

Fowler's statement to Internal Affairs merely consisted of his rendition of what had happened between him and Graham. The statement was no different in substance than Fowler's testimony before the Louisville Civil Service Board or the District Court in the case at bar.

Fowler appealed Higgins' discharge of him to the Louisville Civil Service Board, pursuant to the provisions of Kentucky Revised Statutes (KRS) 90.190. Although apparently believing Fowler's version of the events surrounding his transaction with Graham, including his testimony about his motive for the transaction and his disposal of the materials, the Board voted unanimously to sustain Higgins' dismissal of Fowler from the Louisville Police Department (R. 14, Plaintiff's Motion for Summary Judgment, PX-1; this Brief, Appendix, Exhibit A).

Fowler presented considerable evidence that Higgins, Scholz, and Stansbury manuevered his "hearing" before the Louisville Civil Service Board to

a belated date, then used the more than two months that passed between Fowler's dismissal and this proceeding to find four new appointees for the Civil Service Board* who were supine enough to sustain Fowler's dismissal without any regard for the evidence. This evidence consisted of:

1. Fowler's testimony that the Board as it was constituted before Stansbury's new appointments took their places secretly voted 4-3 to nullify Higgins' dismissal of Fowler, replacing it with a lesser penalty (Fowler Depo., Pp. 84-85);

2. The peculiarly belated nature of Fowler's hearing, which was not held until more than two months after he filed his appeal (David Thomas Depo., P. 13; George Kinkead Depo., P. 12; This Brief, Appendix, Exhibit A);

3. Fowler's testimony that at least one prospective appointee to the Board related to him that Scholtz made a requirement of the prospect's app-

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*As of the date of Fowler's dismissal from the police department, the Board contained four members who had "held over" from the previous administration. Mayor Stansbury had not gotten around to making new appointments (Higgins Depo., P. 42).

ointment to the Board his voting to sustain Fowler's dismissal (Fowler Depo., P. 86);

4. Conflicting testimony from the persons whom Stansbury actually appointed to the Board as to the process whereby they received their appointments (George Kinkead Depo., P. 5; Stansbury Depo., Pp. 13-15).

5. Scholtz's contradictory testimony about his approach to the man whom Fowler testified was solicited by Scholtz to vote to sustain Fowler's dismissal, but who was not actually appointed to the Board (Scholtz Depo., Pp. 5-10);

6. Testimony by the Stansbury appointee who because chairman of the Civil Service Board, James Thornberry, that the Board never modified or set aside a penalty imposed by Higgins or any other city administrator, a practice in direct contrast to that of the Board prior to Stansbury's four appointments (James Thornberry Depo., Pp. 20-21, 32-33); and

7. The Board's own "Findings and Order," which merely recited Fowler's testimony about the events in question, which testimony clearly exon-

erated him, as the basis for its decision to sustain Higgins' dismissal of Fowler! (This Brief, Appendix, Exhibit A).

Fowler's discharge was "justified" by Higgins and Scholtz, and sustained by the Louisville Civil Service Board under Rule 126, section 12 of the Louisville Police Department, which states that:

> Any member or employee may be dismissed, or suffer such other punishment as may be directed, for violation of any of the rules, regulations, or orders, or when found guilty of any of the following offenses:
>
> . . . 12. Any other act or omission contrary to good order and discipline (R. 14, Defendants' Admissions, #7, #8; R. 17, Appendix to Plaintiff's Motion for Summary Judgment, PX-1, PX-3, City's Exhibit #2, #3).

Fowler argued to the District Court that this rule was unconstitutionally vague, and that his discharge from the Louisville Police Department was therefore void. The District Court, based solely upon its apparent disbelief in Fowler's testimony as to his reasons for completing the transaction with Graham and related matters, concluded upon the Respondents' motion for summary judgment that Fowler's conduct was "hard core," depriving him of standing to challenge the Constitutionality of the rule (This Brief,

Appendix, Exhibit B, Pp. 11-12).

Fowler appealed the Civil Service Board's adverse order to the Jefferson Circuit Court of the Commonwealth of Kentucky, pursuant to KRS 90.190(3). The Court affirmed the Civil Service Board's decision. Fowler then appealed to the Court of Appeals of Kentucky, which affirmed the decision of the Jefferson Circuit Court (R. 23, Defendant's Motion for Summary Judgment, Exhibit 1). During the course of these proceedings, Fowler raised only two issues. They were: 1) that he had been denied the equal protection of the law as guaranteed by the state and federal constitutions; and 2) that he, ". . . was not guilty of any violation of any rules of the Louisville Division of Police," (Id., "Petition on Appeal" to Jefferson Circuit Court, #4, #5).

Fowler argued to the District Court in this case that nothing in the Kentucky law of judgments barred this action because under Kentucky law a prior judgment has no preclusive effect in later proceedings if the issues raised in the later proceedings were not, ". . . made or tendered," in the earlier proceedings, and that he had not made

or tendered any due process issues in the proceedings before the Kentucky tribunals [R. 15, Plaintiff's Response to Defendant's Motion for Summary Judgment, citing Bryan Brothers Packing Company v. Garrard, Ky., 336 S.W.2d 468 (1965)].

Despite the parties' agreement in the proceedings before the District Court that Migra v. Warren City School District Board of Education, ___U.S.___, 104 S.Ct. 892, 896, 97 L.Ed.2d 50 (1984) requires the resolution of questions of preclusion such as the one at bar by reference to state law, the District Court concluded without any reference whatsoever to the Kentucky law of judgments that, ". . . plaintiff has had a full and fair opportunity to litigate his claim in the state courts," thereby barring his federal constitutional claims (This Brief, Appendix, Exhibit B, P. 11).

At the time he filed this lawsuit, on September 6, 1983, the law in the Sixth Judicial Circuit of the United States was that due process claims filed in the United States District Courts within the Commonwealth of Kentucky pursuant to 42 U.S.C section 1983 that did not allege any physical in-

jury to the person were governed by the statute of limitations set forth at KRS 413.120(2), which prescribes a five (5) year period, Garner v. Stephens, 460 F.2d 1144, 1146, 1148 (6th Circ., 1972). During the course of this litigation, the Respondents have admitted that all of the wrongs that the Petitioner alleges against them took place less than five years preceeding the date of filing of this lawsuit (R. 23, Defendants' Motion for Summary Judgment, P. 2).

On April 17, 1986, this Court held in Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1931 (1985) that the proper state statute of limitations to apply to all claims brought pursuant to 42 U.S.C. section 1983 was the applicable state statute of limitations for personal physical injuries. In Kentucky, this is KRS 413.140, which prescribes a one (1) year period.

In October, 1985, the District Court ruled in the case at bar that the holding in Wilson v. Garcia, supra, was to be applied retrospectively so as to bar the Petitioner's claim (This Brief, Appendix, Exhibit B, Pp. 4-8). While Fowler's

appeal to the United States Court of Appeals for the Sixth Circuit was pending, that Court handed down the opinion of Mulligan v. Hazard, 777 F.2d 340 (6th Circ., 1985), which held that the rule in Wilson, supra, was to be applied retrospectively so as to extinguish claims that were valid at the time of filing. Fowler argued to the appellate court that Mulligan was a poor opinion that ought to be reversed and not followed in his case. At the "oral argument" of his appeal, which lasted less than 90 seconds, the presiding judge informed Fowler's attorney that the Court would hear no arguments against its Mulligan opinion and that the rule in that opinion disposed of Fowler's appeal. The next case was then called.

The Petitioner, Joseph Fowler, is now asking this Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit so that he may argue that the issues presented for review were wrongly decided by the Courts below.

ARGUMENT

I

IT IS UNJUST AND IMPROPER TO APPLY THE HOLDING OF WILSON V. GARCIA, ___ U.S. ___, 105 S.CT. 1931 (1985) RETROSPECTIVELY SO AS TO EXTINGUISH A CLAIM FILED PURSUANT TO 42 U.S.C. SECTION 1983 BEFORE THE WILSON OPINION WAS HANDED DOWN WHERE THE CLAIM WAS TIMELY FILED ACCORDING TO THE STATE OF THE LAW AS IT EXISTED AT THE DATE THE CLAIM WAS FILED.

In its denial of Petitioner's appeal, the United States Court of Appeals for the Sixth Circuit did not issue an opinion (what the Court did issue is attached hereto as Exhibit C). Of course, from the Court's comments at the "oral argument" of his appeal, the Petitioner believes that it is reasonable to infer that the Court based its decision upon its belief that the District Court had correctly interpreted the meaning of the Wilson opinion, supra, in light of the Sixth Circuit's later opinion in Mulligan, supra.

In Mulligan, supra, the Court made no effort to apply any rules of reason or logic, such as this Court handed down in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971), for use in determining whether to retrospectively apply a new rule of law

governing the interpretation of statutes of limitation. Instead, the Court merely asserted that this Court's alleged silence upon the issue in Wilson operated as an, ". . . implicit mandate," for the retrospective application of the new rule enunciated in Wilson, Mulligan, supra, at 344.

Petitioner believes that when a Circuit Court of Appeals goes so far as to base an opinion upon the silence of this Court, it has because of that, ". . . so far departed from the accepted and usual course of judicial proceedings," or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, Rules of the Supreme Court of the United States, 17.1(a). Oriental despots perhaps have the power to inspire injustice by such means as mere silence. The last time Petitioner read the Constitution of the United States, there was no mention of any despotic branch of government.

Fortunately, courts of appeal other than the Sixth Circuit have been less impressed with theories emanating from a void than it. The United States Court

of Appeals for the Tenth Circuit in the case of Jackson v. City of Bloomfield, 731 F.2d 652, 655 (1984), scrupulously sought substantial justice according to the guidelines set down in Chevron Oil Co., supra, and held that, "It would be most unjust to hold that plaintiffs have slept on their rights, based on a change in the law occurring after their action was filed." Ironically, the Jackson decision was implicitly applauded by this Court in Wilson v. Garcia, supra, 105 S.Ct. at 1941-1942, note 10, and passim. Petitioner, believing that this fact might appeal to a Court that was awed by silence, pointed it out to the Sixth Circuit (Appellant's Reply Brief, Pp. 6-8), but to no avail.

The requested writ should issue, therefore, not only for the reason stated above, but also because the Courts below have, ". . . rendered. . . decision[s] in conflict with the decision of another federal court of appeals in the same matter," Rules of the Supreme Court of the United States, 17.1(a).

II

A UNITED STATES DISTRICT COURT MAY NEVER ACCORD COMPLETE PRECLUSIVE EFFECT TO A STATE COURT JUDGMENT WITHOUT ANY REFERENCE TO THE LAW OF JUDGMENTS OF THE STATE WHOSE COURT ISSUED THE JUDGMENT, AND IN THE CASE AT BAR, PETITIONER'S EARLIER KENTUCKY ADMINISTRATIVE AND JUDICIAL PROCEEDINGS DID NOT BAR HIS LAWSUIT IN DISTRICT COURT PURSUANT TO 42 U.S.C. SECTION 1983.

As we have seen, in determining the Petitioner's attempt to overturn his discharge from the Louisville Police Department resulted in the issuance of orders and judgments that barred his federal claims, the District Court made no effort whatsoever to apply or even to consider the Kentucky law of judgments to the issue (This Brief, Appendix, Exhibit B, Pp. 8-11). The District Court's action in this matter was undertaken despite the fact that all parties urged the Court to decide the issue upon the basis of the Kentucky law of judgments.

This Court has unequivocally held that, ". . . under 28 U.S.C. section 1738 state law governs the preclusive effects of state court judgments in federal proceedings brought pursuant to 42 U.S.C. section 1983," Migra, supra, 104 S.Ct. at 896.

If the District Court's handling of this issue is any indication, the practical result of Migra will not be the promotion of substantial justice, which ironically is a main goal of the Courts of most states in applying the doctrine of res judicata quite sparingly, but an excuse for wholesale docket thinning of section 1983 claims. Federal appellate courts traditionally defer to the rulings of district courts upon matters of state law, which in the case of the rather complicated area of the law of judgments, certainly compounds the problem at issue.

Petitioner believes that this Court must indicate that it will not hesitate to exercise its power of supervision if the unjust results of such unjustified behavior by the lower federal courts as has taken place in the case at bar is to be avoided, Rules of the Supreme Court of the United States, 17.1(a). The case at bar is an excellent vehicle for such an indication from this Court, since the District Court not only ignored state law in deciding to apply the doctrine of res judicata as a bar to Petitioner's claims, but also

because state law is clearly upon the Petitioner's side of the issue.

As we have seen, the Petitioner made or tendered to the Kentucky courts only two issues: his absence of guilt of any rules' violation and the alleged violation of his Constitutional right to equal protection of the law by the persons who fired him. In the case at bar, on the other hand, the Petitioner has alleged various violations of his constitutional right to due process of law. In Bryan Brothers Packing Company v. Garrard, Ky., 336 S.W.2d 468, 471 (1965), the Kentucky Court of Appeals, then the state's highest Court, put to rest a common shibboleth in the law of judgments and clearly limited the application of res judicata to cases other than ones similar to the case at bar when it held that:

> The "general expression. . . that a judgment is conclusive of every matter which the parties might have litigated in the action, is misleading. What is really meant by this expression is, that a judgment is conclusive upon the issues made or tendered and so far as those issues are concerned, of everything which might have been urged for or against them. . . the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by the plaintiff," (italics original)

III

A DISTRICT COURT SHOULD NOT, UPON A MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS, REFUSE TO BELIEVE A PLAINTIFF'S TESTIMONY, THEREBY DENOMINATING THAT PARTY'S CONDUCT AS "HARD CORE" SO AS TO DEPRIVE HIM OF STANDING TO CHALLENGE AS UNCONSTITUTIONALLY VAGUE A REGULATION THAT WAS USED TO JUSTIFY HIS DISMISSAL FROM A MUNICIPAL POLICE DEPARTMENT.

As we have seen, the District Court in this case determined, upon a motion for summary judgment by the Respondents (Defendants), that the Petitioner's testimony was not believable. Aside from obvious problems of the generally genteel social background of federal judges and their unique tenure of appointment, which factors unfortunately often foretell a bias against persons who must toil under conditions that often approach ethical chaos, in the case at bar the District Judge simply violated the ancient and clearly stated rule that the opponent of a motion for summary judgment is entitled to all favorable inferences that may be deduced from evidence of record in a particular case, especially from his own testimony, Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S.Ct. 729, 88 L.Ed. 967 (1949); see also Rogers v. Peabody Coal Company, 342 F.2d 749 (6th Circ., 1965) and Arrasmith v. Pennsylvania Railroad Co., 410 F.2d 1311

1313 (6th Circ., 1969).

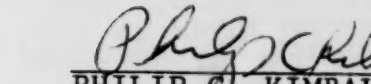
The District Judge's refusal to believe the Petitioner upon a motion for summary judgment by the Respondents has resulted in his being stripped of his opportunity to challenge the Constitutionality of the rule of the Louisville Police Department under which he was punished. Petitioner believes, once again, that the Courts below have in this matter, ". . . so far departed from the accepted and usual course of judicial proceedings," as to call for an exercise of this Court's power of supervision, Rules of the Supreme Court of the United States 17.1(a).

CONCLUSION

Neither of the Courts below even attempted to address the Petitioner's claim that he was denied due process in that he was discharged pursuant to a vague rule and denied any sort of fair hearing upon his dismissal before the Louisville Civil Service Board. Instead they have relied upon bad intuition and half-baked legal concepts in order to defeat the ends of substantial justice. These are circumstances that invite and demand this Court's further consideration and the issuance of the req-

uested writ.

Respectfully Submitted,



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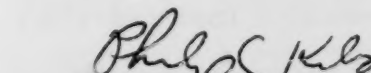
CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this Brief upon the following persons, known by me to be attorneys of record for all of the Defendants (Respondents) in this case, by mailing or delivering the same to their respective offices upon this the 12th day of December, 1986: Paul Guagliardo, Esq., and Mark Dobbins, Esq., both of Room 200, City Hall, Louisville, Ky. 40202, and Irv. Foley, Esq., Jefferson Federal Bldg., Louisville, Ky. 40202.



PHILIP C. KIMBALL
Attorney for Petitioner

APPENDIX INDEX

FINDINGS AND ORDER OF THE LOUISVILLE CIVIL SERVICE BOARD, DATED NOVEMBER 29, 1978 (Jt. Appendix, 134).....EX. A

ORDER OF THE UNITED STATES DISTRICT COURT FOR WESTERN KENTUCKY GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER AND ACCOMPANYING MEMORANDUM (Jt. Appendix, 181-189).....EX. B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SUSTAINING THE DISTRICT COURT'S SUMMARY JUDGMENT AGAINST PETITIONER, ENTERED SEPTEMBER 30, 1986 (not in Jt. Appendix).....EX. C

FULL CITATION OF ALL CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE.....EX. D.

Ex A, P.1

FINDINGS AND ORDER

On November 21, 1978, a hearing was held before the Louisville Civil Service Board on an appeal granted Joseph Leon Fowler, on his dismissal from the Louisville Division of Police by the Director of Safety (the appointing authority) on September 8, 1978.

The appeal was heard by the full Board. Both the appellant and the appointing authority were represented by counsel, and evidence having been heard under oath, the Board hereby makes the following findings and order:

1. Joseph Leon Fowler was dismissed for violation of Rule 126, Section 12 of the Louisville Division of Police Rules and Regulations, for unethical and dishonest which gravely compromised the promotional process of the Police Department and Civil Service.

2. Gave a statement to the Internal Affairs wherein he admitted he had purchased what he thought were questions prepared by the Civil Service office, to be used on the upcoming promotional examination for Police Captain, in which he participated, and finished in second place.

3. Advised he did not read the purchased material, merely "thumbed through" it, and threw it in the garbage, advising he had purchased the material to keep someone else from doing so and using it against him when taking the test.

Ex A, P.2

4. Stated he was unable to report this matter to anyone, because he did not trust anyone in authority.

After hearing the testimony and examining the exhibits, the Civil Service Board made the following decision:

WHEREFORE, the Louisville Civil Service Board, by unanimous decision, makes the following findings and order: the action of the appointing authority in dismissing Joseph Leon Fowler to be and it is hereby sustained.

FOR THE CIVIL SERVICE BOARD

By /Signed
James E. Thornberry,
Chariman

ATTEST:

/Signed
David G. Thomas,
Director and Secretary

/Nov. 29, 1978
Date

Ex B, P.1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH LEON FOWLER, JR,
Plaintiff

v. No. C 83-0890-L(B)

CITY OF LOUISVILLE, et. al.,
Defendants

O R D E R

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendants. . . [naming them] for summary judgment on the claim of the plaintiff, Joseph Fowler, against them be and it hereby is granted.

It is further ORDERED that the motion of the plaintiff, Joseph Fowler, for summary judgment be and it hereby is denied, and this action be and it hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 31st day of October, 1985.

/Signed
THOMAS A BALLANTINE, JR.
United States District Judge

Entered

Oct. 31, 1986

Jesse W. Grider, Clerk
By /Signed
Deputy Clerk

Ex B, P. 3*

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH LEON FOWLER, JR.,
Plaintiff

v. No. C 83-0890-L(B)

CITY OF LOUISVILLE, et. al.,
Defendants

MEMORANDUM

This civil rights action, Title 42 U.S.C. Section 1983, is before the Court on cross motions for summary judgment.

Plaintiff, a lieutenant in the Louisville Division of Police, was discharged by the defendants Higgins, then Chief of Police, and Scholtz, then Director of Safety, from his position after he admittedly purchased a stolen examination which was shortly to be given to candidates for captain. Plaintiff intended to take the examination. His discharge was upheld by the defendant Louisville Civil Service Board.

Striped of its hyperbole, plaintiff's recitation of the background of this action discloses that plaintiff paid an officer named Graham $3,000 for the

---

* There is no page 2 of this exhibit

captain's examination. Apparently Graham obtained the examination from two Louisville police officers who eked out their incomes by free lance burglarly, including burglary of the Civil Service office.

When Higgins learned of plaintiff's action he resolved to fire him, relying on Louisville Division of Police Rule 126, section 12. That rule reads: "Any member or employee may be dismissed or suffer such other punishment as may be directed for violation of any of the rules, regulations, or orders or when found guilty of any of the following offenses: * * * * 12. Any other act or omission contrary to good order and discipline." After his discharge plaintiff appealed this decision to the Jefferson Circuit Court which affirmed the action of the Civil Service Board. The decision of the Jefferson Circuit Court was affirmed in an unpublished opinion by the Court of Appeals of Kentucky.

The Court perceives at least two significant impediments to plaintiff's action.

I. LIMITATIONS

The decision of the Civil Service Board was

rendered November 29, 1978, and this action was filed September 6, 1983.

In Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1931 (1985), the Supreme Court, recognizing the conflict in lower court rulings and the applicable statute of limitations in Section 1983 actions, adopted a bright line rule that the most appropriate statute of limitations is the state statute relating to personal injury claims. The applicable statute in Kentucky is KRS 413.140(1)(a) which establishes a one-year statute of limitations for personal injury actions.

The question then is whether Wilson v. Garcia is to be applied retrospectively or prospectively only.

The Court's research has disclosed a conflict in the circuits as to the retrospective application vel non of Wilson.

In Jackson v. City of Bloomfield, 731 F.2d 652 (10th Circ., 1984), the Court gave prospective application to Wilson. It should be noted, however, that that case was decided before the Supreme Court decision in Wilson. The Wilson case upon

which the Court of Appeals relied was its own decision and the same case which was eventually decided by the Supreme Court. Thus, this Court questions the continued vitality of City of Bloomfield.

In Smith v. City of Pittsburgh, 764 F.2d 188 (3rd Circ., 1985), the court discussed at length the applicability of Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to Wilson v. Garcia. The Court pointed to its decision which held:

> "that where application of the law had been erratic and inconsistent, without clear precedent on which plaintiff could reasonably rely in waiting to file suit, a subsequent Supreme Court decision on the applicable limitations period cannot be said to have overruled clear past precedent on which the litigants may have relied, 764 F.2d at 194.

Expanding further on Chevron, the City of Pittsburgh court weighed the merits and demerits in light of the desirability of furthering federal interest in uniformity, certainty, and minimization of unnecessary litigation. The Court concluded: "Although we cannot say that the policies referred to in Wilson v. Garcia militate clearly in favor of retrospective application, neither do they militate against such application.

Ex B, P.7

Finally, the Court considered the equities of retrospective application and determined that it would not be inequitable or harsh to apply Wilson retrospectively.

This Court determines that Wilson v. Garcia is to be applied retrospectively. In Smith v. General Motors Corp., 747 F.2d 371 (6th Circ., 1984) the court held that the Supreme Court's silence on the question of retroactivity in Del Costello v. Int'l Bro. of Teamsters, 461 U.S. 151, 103 S.Ct. 2281 (1983), created an inference that the Supreme Court intended that decision to apply retroactively since it could have either reserved the issue or, as in Chevron, given it prospective application only.

The Court finds furhter support for retrospective application in Jones v. Preuitt & Maudlin, 767 F.2d 1250 (11th Circ., 1985). In that case the court in footnote 2 found that, "the facts cut in favor of retroactive application of Wilson. . . "

In sum, this Court concludes that Wilson v. Garcia is to be applied retrospectively. Since this circuit has not squarely faced this question,

however, the Court will address what we perceive to be the second and equally compelling reason for granting defendants' motion.

II. RES JUDICATA OR COLLATERAL ESTOPPEL

In Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980), respondent had been convicted in a state criminal prosectuion. Prior to trial he had sought to suppress certain evidence claiming a Fourth Amendment violation. After his motion to suppress was denied, he was convicted. He was dennied federal habeas relief since the state court had given him a full and fair opportunity to litigate his search and seizure claim. Stone v. Powell, 413 U.S. 465, 96 S.Ct. 3037 (1976). Respondent then commenced a section 1983 action against the police who had seized the evidence.

The Supreme Court recognized the traditional adherence of federal courts to the related doctrines of res judicata and collateral estoppel. Under res judicata a final judgment precludes relitigation of issues that were or could have been raised in the prior action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may pre-

clude relitigation of that issue in another and later action involving a party in the first case.

The Allen Court rejected the Court of Appeals' holding that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court.

In the case sub judice plaintiff brought an action in the Jefferson Circuit Court challenging the decision of the Civil Service Board. He alleged a constitutional deprivation of his right to equal protection. That argument was rejected by the court and on appeal the Court of Appeals of Kentucky affirmed the decision of the circuit court.

Only when a party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate an issue will the court refuse to apply the concept of collateral estoppel.

Title 28 U.S.C. Section 1738, which implements Article IV, Section 1 of the Constitution, requires this Court to give the same full faith and credit to judicial proceedings as they would have in the state court. Section 1983 is not an exception to that concept.

In Migra v. Warren City School District, Etc.,

___U.S.___, 104 S.Ct. 892 (1984), the Court laid to rest the notion that even if state court action was issue preclusive, there was no claim preclusion bar to an action in federal court:

> Petitioner suggests that to give state court judgments full issue preclusive effect but not claim preclusive effect would enable litigants to bring their state claims in state court and their federal claims in federal court, thereby taking advantage of the relative expertise of both forums. Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by [section] 1738. That statute embodies the view that it is more important to give full faith and credit to state court judgments than to insure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial proceedings.
>
> In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court. Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state-court judgment in

> this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts." ___U.S. at ___, 104 S.Ct. at 898.

It is crystal clear to this Court that plaintiff has had a full and fair opportunity to litigate his claims in the state courts. He has done so and principles of comity and federalism dictate that he should be barred from relitigating them here.

CONCLUSION

The Court concludes that on either the limitations issue or the res judicata-collateral estoppel issue, plaintiff's complaint must be dismissed. The Court will therefore not address at length the argument that the regulation is unconstitutionally vague. It should be noted that plaintiff's argument that to withstand a challenge to vagueness the misconduct must have been so hard core that any reasonable person would know that the misconduct would be cause for discipline or discharge hoists him by his own petard. That plaintiff had any notion that purchasing an examination which he knew to be stolen would be condoned strains credulity to the sticking point. We agree with Judge Oldham who found plain-

tiff's proffered reason for his conduct--that he purchased the examination to keep others from cheating--incredible.

Defendant's motion for summary judgment will be granted. Plaintiff's motion for summary judgment will be denied, and an appropriate order has been entered this 31st day of October, 1985.

/Signed
THOMAS A BALLANTINE, JR.
United States Dist. Judge

Copies to counsel

E N T E R E D
Oct. 31, 1985
Jesse W. Grider, Clerk
By /Signed
Deputy Clerk

Ex C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH FOWLER, Plaintiff-Appellant vs. CITY OF LOUISVILE, KY. ET. AL., Defendants-Appellees	)))) O R D E R)NOT RECOMMENDED FOR FULL-) TEXT PUBLICATION)Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced

Before: LIVELY, MERITT, Circuit Judges and TIMBERS, 2d Circuit Judge*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE CLERK
John P. Hehman, Clerk

/Signed
Leonard Green, Chief Deputy

---

*The Honorable William H. Timbers, U.S. Court of Appeals for the 2d Circuit, sitting by designation.

Ex D, P1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

United States Constitution, Amendment 5

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code, section 1983

Every person who, under color of any statute, ordin-

ance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

Kentucky Revised Statutes, 90.190

[Subsection 1 provides for the manner of "appealing" to the Civil Service Board for Louisville municipal employees covered by the act, such as police officers, and entitles the aggreived employee to a public hearing, ". . . at which time he shall have the right to introduce evidence in his own behalf, and to be represented by counsel."]

2. The board shall investigate and determine the justification for all suspensions in excess of ten (10) days, or dismissals, or demotions, reported or complained of, according to the provisions of this section. The board shall keep an accurate record of its proceedings under this section, including evidence presented at any public hearing. The board's order and findings shall be final subject to the right of appeal as set out in subsections (3) to (6) of this section

[Subsections 3 to 6 set out the manner in which appeals lie to the circuit court and the Court of Appeals of Kentucky,

but provide no standards of review not stated in subsection 2.

7. Nothing in KRS 90.110 to 90.230 shall permit the suspension, dismissal, or demotion of any employee subject to the provisions of KRS 90.110 to 90.230 on account of religious faith, race, color, creed, or political affiliation.

Kentucky Revised Statutes 413.120(2)

The following actions shall be commenced within five (5) years after the cause of action accrued:

...(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

Kentucky Revised Statutes, 413.140(1)(a)

The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant.

Rule 126, section 12, of the Louisville Police Department

Any member or employee may be dismissed or suffer such other punishment as may be directed for violation of any of the rules regulations, or orders or when found guilty of any of the following offenses:

. . . 12. Any other act or omission contrary to good order and discipline.

FILED
FEB 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. - - - Petitioner

versus

CITY OF LOUISVILLE, KENTUCKY, Et Al. - - - - - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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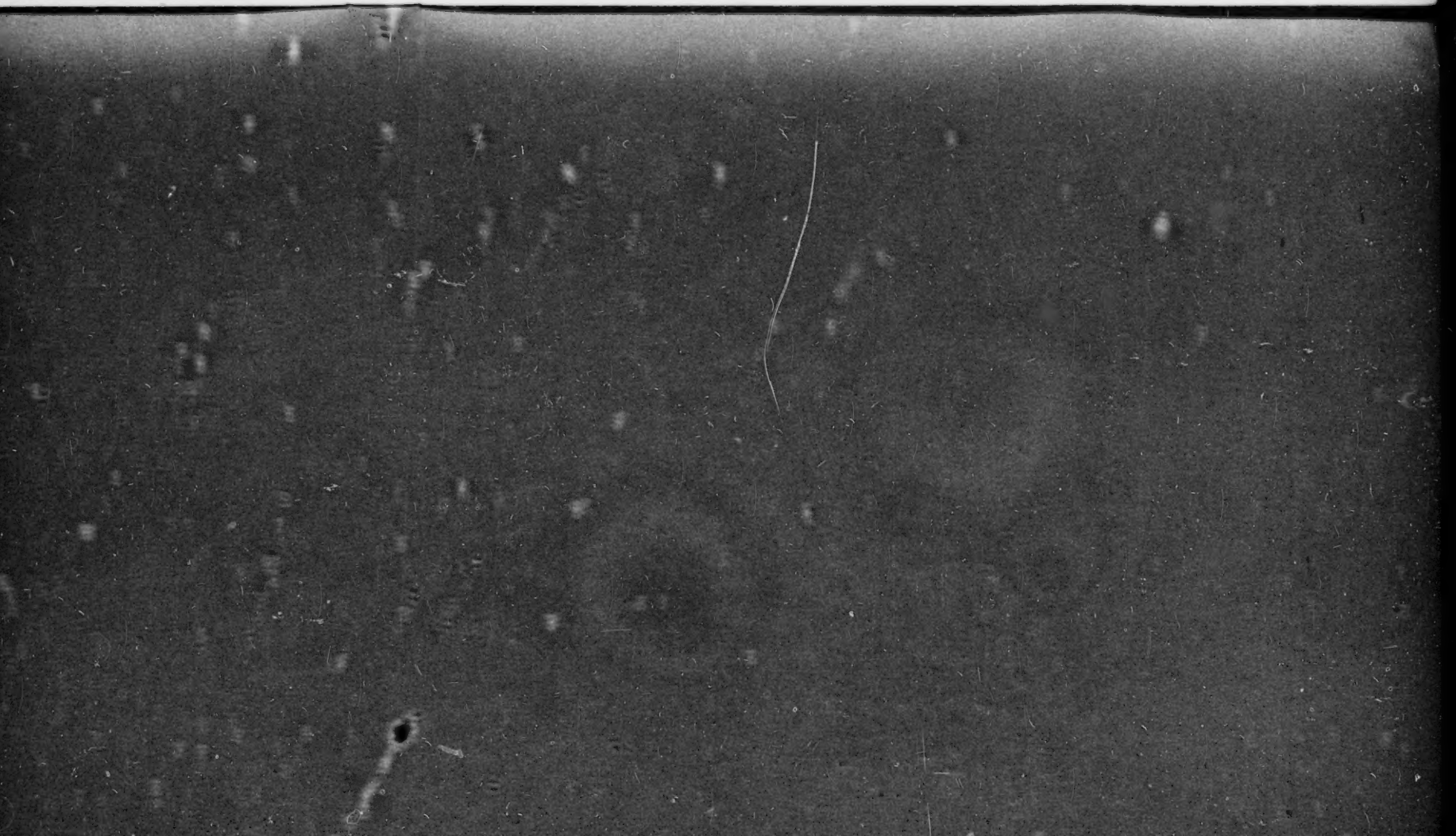

QUESTIONS PRESENTED

I. Whether the District Court's retroactive application of Kentucky's one-year personal injury statute of limitations was consistent with the standards set forth by this Court in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971).

II. Whether the District Court correctly applied Kentucky principles of *res judicata*/collateral estoppel as required by *Migra* v. *Warren City School District Board of Education,* 465 U. S. 75 (1984).

III. Whether petitioner's "hard core" conduct in purchasing a promotional examination deprived him of standing to challenge the vagueness of the police department rule for which he was discharged.

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No. 86-1183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. - - - *Petitioner*

v.

CITY OF LOUISVILLE, LOUISVILLE CIVIL SERVICE BOARD, DAVID THOMAS, WILLIAM STANSBURY, PHILIP SCHOLTZ, JON HIGGINS, ANTHONY TRUSTY, JAMES THORNBERRY, ANN DELOZIER, JAMES POWERS, GEORGE KINKEAD, JAMES CARR, AND GEORGE CLEMENT - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky is reported as *Fowler* v. *City of Louisville,* 625 F. Supp. 181 (W.D. Ky. 1985). Appendix to the Petition for Certiorari ("Pet. App."), Exhibit B, pp. 3-12. The decision without published opinion of the Court of Appeals for the Sixth Circuit is reported at 803 F. 2d 719 (6th Cir. 1986). Pet. App., Exhibit C.

COUNTERSTATEMENT OF THE CASE

Respondents reject petitioner's version of those facts which are based upon his own deposition. For the most part, petitioner's deposition consisted of incompetent and uncorroborated hearsay evidence. Respondents also reject petitioner's interpretations and conclusions based on the deposition testimony of respondents.

Respondents respectfully encourage the Court to scrutinize petitioner's statement of facts by reference to his citations to the record. The Court will then understand that respondents' virtual wholesale rejection of petitioner's conclusory facts is necessitated by his interweaving of occasional kernels of truth among, for the most part, uncorroborated and incompetent assertions of so-called facts.

Respondents instead adopt the facts contained in the memorandum opinion of the District Court, reported at 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd without opinion* 803 F. 2d 719 (6th Cir. 1986). Those facts are as follows (supplemented by references to the record where indicated):

In 1978, Petitioner was a lieutenant with the Louisville, Kentucky Division of Police. On September 8, 1978, petitioner was discharged from the police force because he paid $3,000 for what he believed were questions to an upcoming promotional examination for the position of captain. Petitioner intended to take the examination. Throughout all proceedings to date in

state and federal court, petitioner has admitted this conduct.

Petitioner appealed his discharge to the Louisville Civil Service Board, a body created by state law to hear appeals from disciplinary actions. Kentucky Revised Statute (K.R.S.) 90.190. Pet. App., Exhibit D, pp. 2-3. After a hearing conducted on November 21, 1978 at which petitioner was represented by counsel and evidence was introduced subject to cross examination, the Civil Service Board unanimously voted to sustain the action of the appointing authority. Pet. App., Exhibit A, pp. 1-2.

As allowed by state law, petitioner appealed the decision of the Civil Service Board by filing an action in the Jefferson Circuit Court. In his complaint, petitioner asked for reinstatement and damages on the grounds that he was denied equal protection of the laws and that he was not guilty of violating the Police Department rule with which he had been charged. Petition for Certiorari ("Pet."), pp. 12-21; Joint Appendix to the Sixth Circuit ("J.A."), pp. 158-159.

Although he *could* have, petitioner did *not* assert in his state court action for reinstatement that the rule with which he was charged was unconstitutionally vague or that he had been denied a fair hearing in his appeal to the Louisville Civil Service Board. Pet., pp. 12-13.

On April 29, 1982, the Jefferson Circuit Court upheld petitioner's dismissal from the police department. J.A., pp. 160-161.

As authorized by state law, KRS 90.190, petitioner took an appeal to the Kentucky Court of Appeals. On April 1, 1983, in an unreported opinion, the Kentucky Court of Appeals affirmed the judgment of the circuit Court. J.A., pp. 155-157. The opinion of the Court of Appeals became final on April 22, 1983 when petitioner declined to file a motion for discretionary review by the Supreme Court of Kentucky. Kentucky Rules of Civil Procedure 76.30(2)(a).

Having obtained the services of a new attorney, petitioner filed the instant 42 U.S.C. Section 1983 action in the United States District Court on September 6, 1983. Petitioner alleged that respondents violated his due process rights by discharging him pursuant to an unconstitutionally vague regulation of the Louisville Division of Police. Pet., p. 1; Pet. App., Exhibit D, p. 3: Rule 126, Section 12. Petitioner also alleged that respondents denied him a fair hearing in his appeal of his discharge to the Louisville Civil Service Board, Pet., p. 1.

After the taking of discovery, both parties filed motions for summary judgment and responses thereto. By order dated October 31, 1985, the District Court denied petitioner's motion for summary judgment and granted respondents' motion, thereby dismissing the action. A memorandum opinion reported at 625 F. Supp. 181 (W.D. Ky. 1985) accompanied the court's final order.

In its opinion, the District Court explained that the action was barred by the applicable statute of limita-

tions (one (1) year in Kentucky, K.R.S. 413.140) and was also barred by principles of *res judicata* or collateral estoppel. *Fowler* v. *City of Louisville,* 625 F. Supp. at 183-185.

The District Court also noted that petitioner's challenge as to the vagueness of the rule with which he was charged would not stand because his misconduct was so hard core that "any reasonable person would know that the misconduct would be cause for discipline or discharge. . . ." 625 F. Supp. at 185. The District Court agreed with the state trial judge in petitioner's earlier action "who found plaintiff's [petitioner] proffered reason for his conduct — that he purchased the examination to keep others from cheating — incredible." 625 F. Supp. at 185.

The District Court judgment was affirmed without a published opinion on September 30, 1986. *Fowler* v. *City of Louisville,* 803 F. 2d 719 (6th Cir. 1986).

REASONS FOR DENYING CERTIORARI

I. The District Court's Retroactive Application of Kentucky's One-Year Statute of Limitations is Consistent With the Standards Set Forth in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971).

In *Wilson* v. *Garcia,* ___ U. S. ___, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985), this Court held that the applicable statute of limitations for actions brought pursuant to 42 U.S.C. Section 1983 is the state statute of limitations relating to personal injuries. The applicable statute in Kentucky is K.R.S. 413.140 which

establishes a one (1) year statute of limitations for personal injury actions.

The District Court, citing to this Court's decision in *Chevron Oil Co.* v. *Hudson,* 404 U. S. 97 (1971), held that the decision in *Wilson* v. *Garcia* should be applied retrospectively. *Fowler* v. *City of Louisville,* 625 F. Supp. at 183. Subsequently, the United States Court of Appeals for the Sixth Circuit announced that within the Sixth Circuit, *Wilson* v. *Garcia* was to be applied retrospectively. *Mulligan* v. *Hazard,* 777 F. 2d 340 (6th Cir. 1985), *cert. denied,* ___ U. S. ___, 90 L. Ed. 2d 988, 106 S. Ct. 2902 (1986).

In his petition, petitioner states that on September 6, 1983, when he filed the instant action, the law in the Sixth Circuit was that Section 1983 claims filed in Kentucky for violation of due process in employment situations were governed by the five (5) year statute of limitations set forth in KRS 413.120(2).[1] Petitioner relies on *Garner* v. *Stephens,* 460 F. 2d 1144 (6th Cir. 1972) for this proposition. Pet. pp. 13-14. Petitioner thus implies that the first of the three-prong test set out by the Court in *Chevron Oil Co.* v. *Hudson* for nonretroactive application of the rule in *Wilson* v. *Garcia* has been met:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants

[1]Prior to *Wilson* v. *Garcia,* Kentucky's one (1) year statute, KRS 413.140, applied to Section 1983 actions analogous to tort actions, *e.g.,* assault, false arrest, malicious prosecution, personal injury, etc. *Carmicle* v. *Weddle,* 555 F. 2d 554 (6th Cir. 1977).

> may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . *Chevron Oil Co.*, 404 U. S. at 106.

Petitioner's reliance upon *Garner* v. *Stephens*, 460 F. 2d 1144 (6th Cir. 1972) is misplaced. At least since 1980, petitioner should have been on notice that a U. S. District Court in Kentucky had held that a Section 1983 claim for violation of due process (wrongful denial of hearing; claim for reinstatement) should properly be brought within one (1) year pursuant to K.R.S. 413.140. *Hines* v. *Board of Education of Covington, Kentucky*, 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd*, 667 F. 2d 564 (6th Cir. 1982).

In *Hines*, the District Court specifically noted the Sixth Circuit's decision in *Garner*, but explained that *Garner* had involved claims of discrimination based on sex, a type of action unknown to the common law. 492 F. Supp. at 472, n. 10. The District Court concluded that the appropriate Kentucky statute of limitation to be applied in *Hines* was the one (1) year statute provided in KRS 413.140.

The Sixth Circuit affirmed in a published opinion, *Hines* v. *Board of Education of Covington, Kentucky*, 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd*, 667 F. 2d 564 (6th Cir. 1982).

Thus, petitioner's rejection of the Sixth Circuit's retroactive rule in *Mulligan* v. *Hazard*, 777 F. 2d 340 (6th Cir. 1985), *cert. denied* ____ U. S. ____, 90 L. Ed. 2d 988, 106 S. Ct. 2902 (1986), as well as his implication that the District Court misapplied the *Chevron*

test in its application of the one (1) year Kentucky statute of limitations are both erroneous.

It should also be pointed out that this Court, in addition to *Mulligan,* has in at least seven instances recently denied certiorari from decisions applying *Wilson* v. *Garcia* retroactively: *Brady* v. *Pettit,* 762 F. 2d 1006 (6th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 110, ___ S. Ct. ___ (1985); *Hayes* v. *Cannon,* 753 F. 2d 1081 (9th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 230, ___ S. Ct. ___ (1985), *reh'g denied,* ___ U. S. ___, 88 L. Ed. 2d 566, ___ S. Ct. ___ (1985); *Gates* v. *Spinks,* 771 F. 2d 916 (5th Cir. 1985), *cert. denied,* ___ U. S. ___, 89 L. Ed. 2d 603, 106 S. Ct. 1378 (1986); *Jones* v. *Preuit & Maudlin,* 763 F. 2d 1250 (11th Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 926, 106 S. Ct. 893 (1986); *Wycoff* v. *Menke,* 773 F. 2d 983 (8th Cir. 1985), *cert. denied,* ___ U. S. ___, 89 L. Ed. 2d 339, ___ S. Ct. ___ (1986); *Smith* v. *City of Pittsburg,* 764 F. 2d 188 (3rd Cir. 1985), *cert. denied,* ___ U. S. ___, 88 L. Ed. 2d 297, 106 S. Ct. 349 (1985); *Thomas* v. *Willis,* 786 F. 2d 1148 (3d Cir. 1986), *cert. denied,* ___ U. S. ___, 93 L. Ed. 2d 27, ___ S. Ct. ___ (1986).

Petitioner presents no facts which give rise to a new issue requiring review by this Court. The decision of the District Court, affirmed by the Sixth Circuit, is consistent with the standards for retroactivity set forth in *Chevron Oil Co.* v. *Hudson.*

II. The District Court Correctly Applied Kentucky Principles of *Res Judicata*/Collateral Estoppel as Required by *Migra V. Warren City School District Board of Education*, 465 U. S. 75 (1984).

Petitioner's Argument II presents no federal constitutional or statutory question that justifies the grant of writ of certiorari here. (Petitioner's Argument II appears to incorporate items II and III of his "Questions Presented for Review." Pet., p. i).

The District Court's ruling that petitioner's action was barred by principles of *res judicata*/collateral estoppel was a correct interpretation of Kentucky law.

This Court has recently held that under 28 U.S.C. Section 1738, state law governs the preclusive effect "as to a federal issue that a Section 1983 litigant could have raised but did not raise in the earlier state court proceeding." *Migra* v. *Warren City School District Board of Education,* 465 U. S. 75 (1984). The Court in *Migra* specifically rejected the federal plaintiff's argument that a state court judgment should only preclude a federal court Section 1983 action as to issues actually litigated in state court.

Kentucky courts have long recognized the doctrine that *res judicata* precludes relitigating matters previously litigated. This applies not only to points upon which the previous court was required to pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The doctrine not only embraces

matters technically involved, but it extends further and compels parties to bring forward and present to the court every fact then existing in support of the claim or in defense. *Combs* v. *Prestonburg Water Co.,* 260 Ky. 169, 84 S. W. 2d 15, 18 (1935).

In a later case, the Kentucky high court again held:

> The proposition that a litigant is precluded as to matters which he *could have* asserted (as well as to matters that actually were asserted) applies only to such matters as "properly were involved in the scope of the proceedings or belonged to the subject of the litigation," [citation omitted] . . . or the application of which would be to sustain or defeat the right asserted in the earlier proceeding [citation omitted].

Gilbert v. *Bowling Green Bank & Trust Company,* Ky., 460 S. W. 2d 14, 15 (1970) (Emphasis in original)

Recently, the Kentucky Court of Appeals, the state's intermediate appellate court, explained the holding in *Combs* regarding issue preclusion by holding that:

> . . . [T]hose issues which are germaine to, implied in, or so essentially connected with the actual issues in a previous case as to be involved in the scope of the proceedings are precluded from being raised in a later case between the parties or their privies.

Norell v. *Electric & Water Plant Board of the City of Frankfort,* Ky. App., 557 S. W. 2d 900, 902-903 (1977).

In pleadings before the District Court but most recently in his brief to the Sixth Circuit, petitioner

admitted that he could have asserted the due process claims alleged in his federal Section 1983 action in the earlier state court proceeding:

> The plaintiff readily admits that he could have, "made or tendered", [in the earlier state court proceeding] the issues of federal due process violations that he raised for the first time in the case at bar. However, under Kentucky law as set forth in *Bryan Brothers, supra,* he had no obligation to do so since these issues were simply, ". . . not necessary to support his cause of action." Petitioner's Brief to the Sixth Circuit, p. 24.

Petitioner's citation of *Bryan Brothers Packing Company* v. *Garrard* is incorrect. The citation should read, 386 S. W. 2d 469, 471 (Ky. 1965). Respondents encourage this Court to review the opinion in *Bryan Brothers,* including the passage quoted on page 21 of the petition for a writ of certiorari. As is clear from the holding in *Bryan Brothers,* Petitioner *was* in fact under an obligation to make or tender all issues necessary to support his cause of action for wrongful discharge.

Petitioner is simply wrong in his understanding of Kentucky law. The District Court, a respected former state trial judge,[2] in applying this Court's holding in *Migra,* obviously disagreed with petitioner's analysis of Kentucky's *res judicata* principles when he dismissed petitioner's complaint.

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[2] "Judge [Thomas A.] Ballentine [Jr.], an experienced jurist who had previously served as a judge of the Circuit Court in Kentucky . . ." *Wagner* v. *Harris,* 754 F. 2d 186, 191 (6th Cir. 1985).

In summary, this Court is not the appropriate forum to review *res judicata* principles under Kentucky law, absent a showing that Kentucky law conflicts with the U. S. Constitution or this Court's precedents construing federal statutes. Petitioner has made no such showing and there are therefore no special circumstances which justify disturbing the decision of the Sixth Circuit Court of Appeals and the District Court.

Moreover, if this Court chooses to review Kentucky law, it is clear that the District Court correctly applied Kentucky's *res judicata*/collateral estoppel principles in this case. Petitioner's attempt to split his cause of action in a piecemeal fashion was evident to the District Court, as it should also be to this Court.

III. Petitioner's "Hard Core" Conduct in Purchasing a Promotional Examination Deprived Him of Standing to Challenge the Vagueness of the Rule for Which Petitioner was Discharged.

(Petitioner's Argument III is identical to item IV of his "Questions Presented For Review" Pet., p. ii.).

Both parties moved for summary judgment before the District Court, supported by affidavits and depositions. Petitioner relied upon his own deposition to explain why he paid $3000 for the upcoming promotional examination. His explanation for this misconduct was that he purchased the examination questions to keep other officers from cheating. J.A., pp. 37-38.

In the earlier state court proceedings, the state trial judge disbelieved petitioner's explanation. Similarly,

in the case at bar, the District Court found petitioner's excuse "incredible." *Fowler* v. *City of Louisville,* 625 F. Supp. at 185. It is ironic that petitioner himself wanted the District Court to accept his self-serving explanation and then challenges the District Court's rejection of that explanation.

In any event, there is certainly presented no constitutional or federal statutory question justifying a grant of certiorari by this Court because the District Court refused to give credence to petitioner's farfetched excuse.

CONCLUSION

1. The District Court's application of Kentucky's one-year statute of limitations and the Sixth Circuit's retroactive application of *Wilson* v. *Garcia* were consistent with this Court's ruling in *Chevron Oil Co.* v. *Hudson.*

2. The District Court's application of Kentucky's *res judicata*/collateral estoppel principles was consistent with *Migra.*

3. The District Court correctly concluded that petitioner's "hard core" conduct prohibited him from challenging the vagueness of the rule for which petitioner was discharged.

The petitioner for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 28.3 I have served three (3) copies of this brief in opposition to the petition for certiorari upon the following attorneys, known by me to be counsel of record for petitioner, by mailing or delivering same to their respective offices on the ____ day of February, 1987: Cecil Davenport, Esq., 835 West Jefferson Street, Louisville, Kentucky 40202 and Phillip C. Kimball, Esq., 200 Kennedy Avenue, Louisville, Kentucky 40206, attorneys for petitioner.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. . . . . PETITIONER

versus

CITY OF LOUISVILLE, KY., et. al. . RESPONDENTS

PETITIONER'S REPLY BRIEF

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*Citation at end of first sentence of first paragraph on page 6 inadvertently omitted.

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VERBATIM CITATIONS OF STATUTES NOT PREVIOUSLY CITED IN THIS CASE

Kentucky Revised Statutes 413.120(1):

> The following actions shall be commenced within five (5) years after the cause of action accrued: . . . (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

Kentucky Revised Statutes 413.140(1)(d):

> The following actions shall be commenced within one (1) year after the cause of action accrued:. . . (d) An action for libel or slander.

ARGUMENT

I

Retroactivity of Limitations?

The Respondents first raised the issue of the possibile applicability of a statute of limitations in their motion for summary judgment (R. 23, Motion for Summary Judgment). In that motion they cited one case, Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938, 85 L.Ed.2d (1985) and one statute, Kentucky Revised Statutes (KRS) 413.140(1)(a), the Kentucky one-year personal injury limitations statute, in support of their argument that Petitioner's claim was barred by a statute of limitation (R. 23, Motion for Summary Judgment, Pp. 2-3). In his response to this motion, of course, the Petitioner made the arguments contained in his Petition before this Court, albeit in greater detail (R. 27, Plaintiff's Response to Motion for Summary Judgment).

In their brief for the United States Court of Appeals for the Sixth Circuit, the Respondents for the first time argued specifically for the retroactive application

of this Court's "bright line" limitations rule in cases filed pursuant to 42 U.S.C. section 1983, as enunciated in Wilson v. Garcia, supra. (Appellee's Brief for the Sixth Circuit, Pp. 25-26).

The Respondents' first citation of the case of Hines v. Board of Education of Covington, Ky., 492 F.Supp. 469 (E.D., Ky., 1980), aff'd, 667 F.2d 544 (6th Circ., 1982) was in their brief filed with this Court. Apparently they respected the ability of the Courts below to understand the clear inapplicability of the holding of the Hines case to the case at bar. Furthermore, neither of the Courts below relied upon Hines in any manner whatsoever.

Hines, supra, stands squarely for the proposition that a public employee without any property interest in his employment who is denied a hearing upon his termination from that employment can articulate a Constitutional claim pursuant to 42 U.S.C. section 1983 only for an alleged violation of his liberty interest in his reputation. Under these circumstances, reasoned the Court in Hines, the applicable state statute

of limitations is that for defamation actions, which in Kentucky is KRS 413.140(1)(d), It provides a one year period during which to bring, "An action for libel or slander," Hines, supra, 667 F.2d 546-565.

Hines did not overturn the rule set forth in Garner v. Stephens, 460 F.2d 1114 (6th Circ., 1979). In it, the Court noted that public employment discharge cases brought pursuant to 42 U.S.C. section 1983 where a property interest is at stake may either be characterized as per KRS 413.120(1) as, "An action upon a contract not in writing, express or implied," or as per KRS 413.120(2) as, "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability," Hines, supra, at 471-472. Both of these limitations periods are five (5) years and either could arguably apply to the case at bar under the characterization process that the Court correctly undertook in Hines and that represented the state of the law prior to this Court's Wilson v. Garcia opinion.

By their inapposite citation of Hines,

the Respondents have tacitly admitted the bankruptcy of the arguments in favor of the retroactive application of this Court's Wilson v. Garcia holding, which arguments simply cannot withstand the light of analysis as per Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

This Court should grant the Petition in order to lay this issue to rest in a just manner.

II

Res Judicata?

The Respondents contend that the Petitioner should not prevail upon the res judicata issue because he, ". . . was in fact under an obligation to make or tender all issues necessary to support his cause of action for wrongful discharge," before the Louisville Civil Service Board and the Kentucky Courts (Respondent's Brief, P. 11).

Petitioner took considerable pains below to show that under Kentucky law any one or more grounds of attack upon his discharge would be sufficient to state a "cause of action" under KRS 90.190, and that in fact he articulated two

grounds of attack upon his discharge before the Louisville Civil Service Board and the courts of Kentucky (Appellant's Brief for the Sixth Circuit, Pp. 23-25). These grounds, namely his denial of guilt of any offense denominated by any rule of the Louisville Police Department and his assertion that his discharge violated his right to the equal protection of the laws, were sufficient together or separately to "support his cause of action" as per Bryan Brothers Packing Company v. Garrard, Ky., 386 S.W.2d 468, 471 (1965). Any issues the the Petitioner did not raise before the Kentucky tribunals were obviously not necessary to support his "cause of action" before them and he was therefore, ". . . under no obligation to tender [them]," to those tribunals, Id.

The Kentucky courts apply the doctrine of res judicata as a surgeon applies a scalpel: with great caution. As the Kentucky Supreme Court said in Floyd County Board of Education v. Layne, Ky., 474 S.W.2d 379, 389-390 (1977) of res judicata:

> . . . it is to be applied in particular situations as fairness and justice require, and. . . is not to be applied so rigidly as to defeat the ends of justice or to work an injustice.

Certain elements must exist before the courts of Kentucky will apply the affirmative defense of res judicata. One is that issues sought to be precluded in a later action must have been, ". . . actually litigated and determined in the prior action," Whittenberg Engineering and Construction Co. v. Liberty Mutual Insurance Co., Ky., 290 S.W.2d 877, 883 (1965). This element is simply not present in the case at bar. Another element necessary to support the plea of res judicata is identity of cause of action between the earlier and later proceedings in which the parties are involved, Blevins v. Johnson, Ky., 344 S.W.2d 375, 377 (1961). In a very recent opinion, the United States District Court for Eastern Kentucky held that a statutory right of appeal by state employees to the Kentucky Personnel Board is not identical to a cause of action brought pursuant to 42 U.S.C. section 1983, even if both actions involve an alleged "wrongful discharge," and refused to apply the

doctrine of res judicata as a bar to the plaintiff's section 1983 claim because of his having pursued an appeal of his discharge to the Kentucky Personnel Board, Barnes v. McDowell, 647 F.Supp., 1307, 1309 (E.D., Ky. 1983). Obviously a statutory right of appeal to the Louisville Civil Service Board is no more identical to an action brought pursuant to 42 U.S.C. section 1983 than a statutory right of appeal to the Kentucky Personnel Board.

Ultimately, the Respondents retreat to sophistry upon this issue as upon the limitations issue, by an ad hominem argument derived from the District Court's well-known and good reputation as a former Kentucky Circuit Judge and the obvious fact that res judicata is a matter of state substantive law. Neither of these facts, of course, mean that the District Judge was correct in the case at bar. Furthermore, if he was not right, the Petitioner's Constitutional rights have been affected by his action as well as those of the Respondents. Withal, the Respondents have amply justified the alarums raised by the Petitioner at page 20 of his Petition for Certiorari, which

petition should be granted for the reasons stated in it.

III

Petitioner's Believability?

The Respondents assert that the state "trial" judge involved in Petitioner's statutory appeal to the Kentucky Courts disbelieved Petitioner's testimony as to his reasons for purchasing materials from Harold Graham and his disposition of those materials (Respondents' Brief, Pp. 12-13). Of course, the District Judge reacted to Petitioner's testimony in a similar manner.

The Respondent has not challenged Petitioner's assertion that the Louisville Civil Service Board actually believed Petitioner's testimony upon these issues (Petition, P. 8). So far, therefore, the score upon the believability of his testimony is 5-2, and the ayes have it.

Obviously, the Petitioner is entitled to have a jury of his peers decide how credible his testimony is. This is especially true of his claim that he was denied a fair hearing before the Louisville Civil Service Board, which

claim has never been addressed in any manner whatsoever by any of the Courts below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Reply Brief in support of the Petition for Certiorari upon the following attorneys for the Respondents: Paul Guagliardo, Room 200, City Hall, Louisville, Ky. 40202, and Mark W. Dobbins, 600 West Main Street, Louisville, Ky., 40202, by amiling or delivering the same to their respective offices upon this the 19th day of February, 1987.

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